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No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

OUTBOARD MARINE CORPORATION,

Petitioner,

v.

THE UNITED STATES OF AMERICA and THE PEOPLE OF THE STATE OF ILLINOIS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

Whether Rule 41(a)(2) of the Federal Rules of Civil Procedure permits the dismissal of a seven-year-old case in which the defendant had expended enormous resources to prepare for trial, and the plaintiff failed to provide an adequate reason for not proceeding to trial.

PARTIES TO THE PROCEEDING

Parties to the proceedings below are the Petitioner, Outboard Marine Corporation, and Respondents the United States of America and the State of Illinois. Monsanto Company was also a party below.

Petitioner Outboard Marine Corporation has an ownership interest in Adventurent, Inc. Outboard Marine Corporation wholly owns its other subsidiaries. There is no parent corporation of Outboard Marine Corporation.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
OPINIONS BELOW	1
JURISDICTIONAL STATEMENT	2
RELEVANT STATUTORY AUTHORITY	2
STATEMENT OF THE CASE	2
1. Nature Of The Lawsuit	2
2. Motions To Dismiss The Complaint	5
3. Discovery	5
4. The Government's Motion to Dismiss	6
5. The District Court Rulings	8
6. The Seventh Circuit Decision	8
REASONS WHY THE PETITION SHOULD BE ALLOWED	9
CONCLUSION	18

APPENDICES:

Opinion, *United States, et al. v. Outboard Marine Corporation, et al.*, 85-1584, April 22, 1986 (7th Cir.) ..... A

Judgment, *United States, et al. v. Outboard Marine Corporation, et al.*, 85-1584, April 22, 1986 (7th Cir.) ..... B

Order Denying Rehearing, *United States, et al. v. Outboard Marine Corporation, et al.*, 85-1584, May 22, 1986 (7th Cir.) C

Memorandum Opinion and Order, *United States, et al. v. Outboard Marine Corporation, et al.*, 78 C 1004, August 30, 1984 (N.D. Ill.) ..... D

Relevant Statutory Authority ..... E

Rule 41(a)(2), Fed. R. Civ. P. E-1

Comprehensive Environmental Response, Compensation and Liability Act of 1980, § 104(a)(1), 42 U.S.C. § 9604(a)(1) E-1

Comprehensive Environmental Response, Compensation and Liability Act of 1980, § 106(a), 42 U.S.C. § 9606(a) E-2

Comprehensive Environmental Response, Compensation and Liability Act of 1980, § 107(a), 42 U.S.C. § 9607(a) E-2

TABLE OF AUTHORITIES

CASES:	PAGE
Armstrong v. Frostie Company, 453 F.2d 914 (4th Cir. 1971)	12
Bamdad Mechanic Company v. United Technologies Corp., 109 F.R.D. 128 (D. Del. 1985)	12
Bunker Ramo Corp. v. United Business Forms, Inc., 713 F.2d 1272 (7th Cir. 1983)	15
Cone v. West Virginia Pulp & Paper Company, 330 U.S. 212 (1947)	11
Durham v. Florida East Coast Railway Co., 385 F.2d 366 (5th Cir. 1967)	14
Federated Department Stores, Inc. v. Moitie, 452 U.S. 394 (1981)	15
Ferguson v. Eakle, 492 F.2d 26 (3d Cir. 1974)	11-13
Harper Plastics, Inc. v. Amoco Chemicals Corp., 657 F.2d 939 (7th Cir. 1981)	15
J.V. Peters & Co., Inc. v. Administrator, United States Environmental Protection Agency, 767 F.2d 263 (6th Cir. 1985)	16
Jones v. Inmont Corp., 584 F. Supp. 1425 (S.D. Ohio 1984)	15
Kern v. TXO Production Corp., 738 F.2d 968 (8th Cir. 1984)	13
Lone Pine Steering Committee v. United States Environmental Protection Agency, 777 F.2d 882 (3d Cir. 1985), *cert. denied*, 106 S.Ct. 1970 (1986)	16

Louis v. Bache Group, Inc., 92 F.R.D. 459 (S.D. N.Y. 1981) 14

Manego v. Orleans Board of Trade, 773 F.2d 1 (1st Cir. 1985), *cert. denied*, 106 S.Ct. 1466 (1986) . 15

McCants v. Ford Motor Co., Inc., 781 F.2d 855 (11th Cir. 1986) 13

Olmstead v. Amoco Oil Co., 725 F.2d 627 (11th Cir. 1984) 15

Outboard Marine Corporation v. Illinois, 453 U.S. 917 (1981) (Mem.) 4, 17

Outboard Marine Corporation v. Thomas, 773 F.2d 883 (7th Cir. 1985) 17

Paturzo v. Home Life Insurance Co., 503 F.2d 333 (4th Cir. 1974) 12-13

Puerto Rico Maritime Shipping Authority v. Leith, 668 F.2d 46 (1st Cir. 1981) 13

Scallen v. Minnesota Vikings Football Club, Inc., 574 F. Supp. 278 (D. Minn. 1983) 12

Shaffer v. Evans, 263 F.2d 134 (10th Cir. 1958), *cert. denied*, 359 U.S. 990 (1959) 12

State of Illinois v. Outboard Marine Corp., 680 F.2d 473 (7th Cir. 1982) 4, 17

State of Ohio ex rel. Brown v. Georgeoff, 562 F. Supp. 1300 (N.D. Ohio 1983) 15

Tyco Laboratories v. Koppers Co., 627 F.2d 54 (7th Cir. 1980) 13

United States v. Allied Chemical Corp., 587 F. Supp. 1205 (N.D. Cal. 1984) 14

United States v. NEPACCO, 579 F. Supp. 823 (W.D. Mo. 1984) 14

United States v. Outboard Marine Corp., 104 F.R.D. 405 (N.D. Ill. 1984) 8

United States v. Reilly Tar & Chemical Corp., 546 F. Supp. 1100 (D. Minn. 1982) 15

United States v. Wade, 577 F. Supp. 1326 (E.D. Pa. 1983) 15

Wakefield v. Northern Telecom, Inc., 769 F.2d 109 (2d Cir. 1985) 12

Wheaton Industries v. United States Environmental Protection Agency, 781 F.2d 354 (3d Cir. 1986) 16

Williams v. Ford Motor Credit Co., 627 F.2d 158 (8th Cir. 1980) 12, 13

STATUTES AND REGULATIONS:

Federal Rules of Civil Procedure

Rule 41(a)(1) 10

Rule 41(a)(2) ..... *passim*

Rule 41(b) 10

28 U.S.C. § 1254 2

28 U.S.C. § 1331 3

28 U.S.C. § 1345 3

Refuse Act of 1899, § 13, 33 U.S.C. § 407 3

Clean Water Act, § 309(b), 33 U.S.C. § 1319 ... 3

Clean Water Act, § 402, 33 U.S.C. § 1342 3

Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. § 9601, *et seq.* ..... *passim*

§ 104, 42 U.S.C. § 9604 7

§ 106, 42 U.S.C. § 9606 3

§ 107, 42 U.S.C. § 9607 ..... 7, 14-15

§ 113, 42 U.S.C. § 9613 3

MISCELLANEOUS:

1B Moore's Federal Practice ¶ 0.409 [1.—2] (1984) . 15

Report of Proposed Amendments to Rules of Civil Procedure (1946) 10

Restatement of Judgments 2d, § 25 Comment d (1980) 15

9 C. Wright & A. Miller, Federal Practice & Procedure, § 2364 at 165 (1971) 10

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OUTBOARD MARINE CORPORATION,

Petitioner,

v.

THE UNITED STATES OF AMERICA and THE PEOPLE OF THE STATE OF ILLINOIS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Outboard Marine Corporation petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The decision of the Court of Appeals for the Seventh Circuit is reported at 789 F.2d 497 (1986). The district court decision is reported at 104 F.R.D. 405 (N.D. Ill. 1984).

JURISDICTIONAL STATEMENT

This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254 and Supreme Court Rule 17. The decision of the Court of Appeals for the Seventh Circuit was entered on April 22, 1986. A timely-filed petition for rehearing was denied by the Court of Appeals on May 22, 1986.

RELEVANT STATUTORY AUTHORITY

See Appendix E, *infra.*

STATEMENT OF THE CASE

Nature Of The Lawsuit

The Petitioner, Outboard Marine Corporation ("OMC"), is a manufacturer of outboard motors, lawn mowers and industrial and turf-care vehicles. It has operated an industrial complex on its property near Waukegan Harbor in Waukegan, Illinois for nearly fifty years. OMC's manufacturing process has included aluminum die casting operations at its Waukegan facilities since the 1920's. Beginning in the late 1950's, that process utilized hydraulic fluids purchased from the Monsanto Company which contained polychlorinated biphenyls ("PCBs"). OMC utilized such fluids because of their ability to withstand the ex-

tremely high pressures and heat of the die casting process without causing fires. U.S. Second Amended Compl. ¶¶ 10, 12-14; R.A. 471.[1]

In 1976, the United States Environmental Protection Agency ("EPA") and the Illinois Environmental Protection Agency publicly stated that there were deposits of PCBs in the innermost slip of Waukegan Harbor. They later stated that there were also PCB deposits in a drainage ditch at the northern end of OMC's property.

Respondent, the United States of America, on behalf of the United States Environmental Protection Agency (hereinafter referred to as "EPA"), filed suit against OMC on March 17, 1978. R.A. 1.[2] The initial complaint stated that PCBs in OMC's discharge water had contaminated "the North Ditch, Waukegan Harbor, and Lake Michigan, as well as the groundwater underlying and adjacent to Outboard Marine's facility, and certain portions of the soils on OMC's facility." R.A. 1. Each of the three counts of the complaint alleged that the deposits of PCBs had harmed the environment and threatened public health. *Id.*, ¶¶ 20, 27, 31.

Based on those allegations, the complaint attempted to plead causes of action under the Refuse Act of 1899, 33 U.S.C. § 407, § 402 of the Clean Water Act, 33 U.S.C.

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[1] Citations to documents in the record on appeal in the Seventh Circuit are cited herein as "R.A." followed by the number of the document in the clerk's List of Documents.

[2] In its Second Amended Complaint, the government stated that it was invoking the court's jurisdiction "by virtue of 28 U.S.C. § 1331, 28 U.S.C. § 1345, Section 309(b) of the Clean Water Act, 33 U.S.C. § 1319(b); and Sections 106 and 113 of [the Comprehensive Environmental Response, Compensation and Liability Act], 42 U.S.C.A. §§ 9606 and 9613." R.A. 471.

§ 1342, and "common law." *Id.*[3] The government prayed, *inter alia*, for injunctive relief against OMC, requiring it to implement a project to dredge and remove from the area all sediments containing PCBs. The complaint also contained counts against Monsanto Company, demanding the same relief. *Id.*

On August 10, 1978, the State of Illinois filed a complaint against OMC, containing essentially the same factual allegations. *State of Illinois v. Outboard Marine Corporation*, 78 C 3187 (N.D. Ill.). At the time the case was dismissed, the State was an intervening plaintiff asserting state law claims in the case brought by the United States. R.A. 566.[4]

In 1982, the government added a claim against OMC under the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601 *et seq.* ("Superfund"). The government chose not to sue OMC under the cost-recovery provisions of Superfund, § 107, 42 U.S.C. § 9607, for the costs it had already expended or for its future remedial costs. Instead, it added a count under Superfund § 106(a), 42 U.S.C. § 9606(a), which provides for

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[3] On remand from this Court, *Outboard Marine Corp. v. Illinois*, 453 U.S. 917 (1981) (Mem.), the Seventh Circuit held that the State's purported claim under federal common law had been preempted by the Clean Water Act. *State of Illinois v. Outboard Marine Corp.*, 680 F.2d 473, 481 (7th Cir. 1982). Based on that ruling, the district court struck the common law claims brought by the United States.

[4] During most of the proceedings, the State of Illinois did not take an active role in this case, but instead approved the decisions of the United States. *See, e.g.*, Transcript of Proceedings March 9, 1983, pp. 13-15, R.A. 713 (remarks of Mr. Hartigan); Transcript of Proceedings, Feb. 6, 1985, p. 6, R.A. 713. Although this Petition applies fully to the State, in the interest of brevity, OMC omits subsequent references to the State except when necessary to clarify the record.

injunctive relief to abate an "imminent and substantial endangerment to the public health or welfare or the environment." R.A. 471.

Motions To Dismiss The Complaint

OMC filed motions to dismiss each of the pending counts against it in the Second Amended Complaint for failure to state a claim for which injunctive relief could be granted. R.A. 407, 458A, 463. Although the district court initially denied those motions, after reviewing OMC's motion for reconsideration, the court stated that it had only a "sixty percent comfort" in its prior rulings, and it therefore urged the government to settle the case. R.A. 713. Oral argument on OMC's motion for reconsideration was rescheduled numerous times over the next two years with OMC ultimately unable to obtain any ruling from the court on that motion. R.A. 628, 661, 663.

Discovery

After this case was filed, numerous studies were commissioned, and the parties undertook an exhaustive accumulation of evidence relating to whether PCBs in the Waukegan Harbor area were harming or threatening human health or the environment, and whether any such harm or threat necessitated the removal operation the government demanded. R.A. 671. The experts retained in this case covered a broad range of subject matters: medical experts concerning the health effects of PCBs, hydrology and geology experts concerning the flow of water and sediment, aquatic biologists concerning the effects of PCBs on Waukegan aquatic life, mathematical modeling experts to estimate whether PCBs were migrating from their present locations into the air or into Lake Michigan, and environmental engineers to propose remedial projects.

During the course of the proceedings, the government hired and terminated several sets of experts, each of them proposing radically different remedies ranging in cost from well over fifty million dollars to under four million dollars. R.A. 671.

Both the highly technical nature of the evidence, and the staggering cost of government's various proposed remedies, compelled OMC to expend enormous resources to defend the case. OMC deposed over fifty government witnesses. R.A. 685 at 4n. OMC also presented eighteen of its own witnesses, and it deposed thirty witnesses associated with the Monsanto Company. By the time discovery ceased in 1983, the lawsuit had generated over 60,000 pages of documents and almost 19,000 pages of transcripts. *Id.*

When discovery was nearly complete in 1982, the government filed responses to requests to admit which effectively conceded that it had no evidence that PCBs in the Waukegan area had harmed the environment or public health. R.A. 563. The government expressly admitted that it had no evidence of any person having been harmed in any way by PCBs from the Waukegan Harbor area. It further conceded that the air and drinking water in and around the Waukegan PCB sites "pose[ ] no significant human health problem attributable to PCBs there." *Id.* Those admissions were made at the conclusion of all the government's studies and after PCBs had been in their present location in the Waukegan Harbor area for at least thirty years. R.A. 671, 686.

The Government's Motion To Dismiss

After it filed its responses to the requests to admit, the government radically altered its strategy and began to proceed "administratively" to carry out its own remedy

under § 104 of the Superfund Act, 42 U.S.C. § 9604. It also filed a motion to stay the proceedings pending its "determination" of a proper remedy. R.A. 639, 642.[5]

After numerous delays, the government announced in 1984 that its administrative proceedings were finally completed. At that time, it issued a "Record of Decision" of its choice of remedial action in the Waukegan Harbor area. The government simultaneously moved to dismiss the lawsuit without prejudice pursuant to Rule 41(a)(2), Fed. R. Civ. P. R.A. 669. The government's announced intent was to implement a dredging project costing twenty-seven million dollars and then to sue OMC under the cost-recovery provisions of Superfund, § 107, 42 U.S.C. § 9607, at some indefinite time in the future for the costs of that remedy. R.A. 669.

In response, OMC contended that Rule 41(a)(2) precluded the dismissal of this case without prejudice. OMC argued that the government should not be allowed to dismiss its injunction case merely because it had now decided to pursue OMC for damages under the same cause of action. The pendency of the lawsuit for seven years had resulted in enormous expense to OMC. OMC argued that it was accordingly entitled to a final ruling on its liability for the presence of PCBs in the Waukegan Harbor area. R.A. 671, 686.

OMC argued that the government's dismissal of the case on the eve of trial was contrary to the overwhelming public interest in a determination of what, if any, problem exists from the presence of PCBs in Waukegan Harbor. It contended that the government's dismissal served no

[5] The Seventh Circuit incorrectly stated that OMC acceded to that stay. App. A at A-14, *infra*. In fact, OMC never assented to it.

public purpose except to permit it vastly to increase its damages before presenting its case in court.

The District Court Rulings

In its August 30, 1984 ruling, the district court granted the plaintiffs' motions for voluntary dismissal. *United States v. Outboard Marine Corp.*, 104 F.R.D. 405 (N.D. Ill. 1984), App. D, *infra*. The court recognized the legal prejudice to OMC that had resulted from the many years of costly litigation, and it acknowledged the uncertain legal basis of the government's case in light of OMC's motion to reconsider. App. D at D-6, *infra*. The court conditioned dismissal on the plaintiffs' acceptance of a dismissal of the pending counts of their complaints with prejudice. App. D at D-7, *infra*. When OMC informed the district court that the cost-recovery action was already ripe, and that a dismissal with prejudice should therefore bar that claim as well, it simply reversed itself and dismissed the action without prejudice to preserve the government's future damage action. R.A. 713. The court conditioned that dismissal on the government's execution of a covenant not to sue OMC except under the Superfund cost-recovery provisions. *Id.* Subsequently, the court awarded OMC a discounted measure of its costs. App. A at A-18 n.12, *infra*.

The Seventh Circuit Decision

OMC appealed the dismissal, and the Court of Appeals for the Seventh Circuit affirmed on April 22, 1986. 789 F.2d 497; App. B, *infra*. Like the district court, the Court of Appeals accepted without analysis the government's explanation that it needed to dismiss the case in order to implement a cleanup project. The Court also gave no weight to the extensive trial preparation OMC had conducted, and it in fact blamed OMC for conducting a vigorous defense:

> The appellants have fought the government every possible inch of the way for over six years in court concerning the validity of the proposed injunctive relief action and whether the State of Illinois was a proper party to this action. A major reason why the PCB problem has not been resolved at this point in time is the continuous and protracted litigation of this case. While we do not fault the appellants for exercising their constitutional right to defend this action in the manner they believe is most appropriate, it is 'too late in the day' for them to complain that they somehow have been prejudiced by the delay in this case in proceeding to trial for they actively participated in this litigation nightmare which we are sad to say is far from its final chapter.

App. A at 13, *infra.*

REASONS WHY THE PETITION SHOULD BE ALLOWED

This matter raises issues central to the administration of justice in the federal district courts. The United States and the State of Illinois sued Outboard Marine Corporation in 1978, and seven years later that case was dismissed without prejudice, allowing the very same matter to be re-filed at a later date. The rights of a private litigant to a final resolution of a massive lawsuit against it have been completely ignored in the name of deference to agency discretion. That result, especially in the compelling circumstances of this case, demonstrates that the policy of Fed. R. Civ. P. 41(a)(2) is not being followed, or is being followed inconsistently. The present matter provides an opportunity for this Court to set guidelines

for the application of Rule 41(a)(2) in the context of a matter of crucial public interest.

Rule 41, Fed. R. Civ. P., provides several mechanisms whereby a lawsuit can be dismissed. Rules 41(a) and (b) govern dismissals of first-party actions, with 41(a) governing voluntary dismissals on the motion of the plaintiff and 41(b) govering involuntary dismissals on the motion of the defendant. Rule 41(a)(1) allows the plaintiff to dismiss an action without prejudice merely by filing a notice of dismissal, if the notice is filed before the defendant has filed an answer or motion for summary judgment.

Rule 41(a)(2) takes effect once the defendant has answered the complaint or otherwise brought the case to issue by filing a motion for summary judgment:

> **By Order of Court.** Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

The rule draws a bright line which subjects voluntary dismissals to the court's review once the defendant has expended "the research and preparation" necessary to file a motion for summary judgment or answer the complaint. Report of Proposed Amendments to Rules of Civil Procedure, 57 (1946). The "purpose of Rule 41(a)(2) 'is primarily to prevent voluntary dismissals which unfairly affect the other side . . . ' ." 9 C. Wright & A. Miller, Federal Practice & Procedure § 2364 at 165 (1971). Typically, such

unfairness results when the defendant has prepared for trial only to be faced with a Rule 41(a)(2) motion filed without adequate justification. *See Cone v. West Virginia Pulp & Paper Company*, 330 U.S. 212, 217 n.5 (1947) (Rule 41(a)(2) requires the plaintiff to show the existence of a meritorious claim which cannot be resolved in the pending case).

Unfortunately, the absence of guidance from this Court has allowed the lower courts to reach widely divergent results under very similar conditions. In *Ferguson v. Eakle*, 492 F.2d 26 (3d Cir. 1974), the lawsuit was fourteen months old when the plaintiff discovered that his case required joinder of a defendant who would have destroyed diversity jurisdiction. Plaintiff therefore moved under Rule 41(a)(2) to dismiss without prejudice so that he could refile in state court.

The district court granted the motion, but the Third Circuit reversed and ordered the matter reinstated. The court noted that the progress of the case had led the defendants to expect a trial in the near future:

> The district court changed all that. Fourteen months after they became defendants in one case and had gone to the expense of retaining counsel, six months after they had gone through pre-trial and at least two months after they had expected that all discovery had been completed, they were ordered to defend anew in another court. This we believe, amounted to prejudice—financial prejudice requiring additional counsel fees for the time and energies to be expended for the preparation and conduct of new discovery and proceedings up to trial. They sustained all the emotional and psychological trauma associated with the experience of having been ready for trial in a federal court and then told that the proceedings would be started again in the state court. Most important, they suffered the non-financial prejudice reflected by

> the uncertainty over their title to the bay front property. We believe that the totality of these circumstances amounted to a quantum of prejudice to the defendants so as to characterize the district court's action as an abuse of discretion.

Id. at 29 (footnotes omitted).

Similarly, in *Paturzo v. Home Life Insurance Co.*, 503 F.2d 333 (4th Cir. 1974), the case had progressed to the morning of trial when plaintiff moved to dismiss one count of the complaint without prejudice. The court noted that "both parties had prepared extensively for trial," and it therefore upheld the denial of the plaintiff's motion "in view of the advanced state of the proceedings." *Id.* at 335. Other cases have followed *Ferguson* and *Paturzo* in refusing to grant Rule 41(a)(2) motions when the case is ready or nearly ready for trial, when the defendant has expended substantial resources in defense or when the plaintiff fails to provide a compelling reason for dismissal.[6]

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[6] *See, e.g., Wakefield v. Northern Telecom., Inc.*, 769 F.2d 109, 114 (2d Cir. 1985) (dismissal under Rule 41(a)(2) improper on sixth day of trial when plaintiff failed to give reasons for motion); *Williams v. Ford Motor Credit Company*, 627 F.2d 158, 159-60 (8th Cir. 1980) (voluntary dismissal of eighteen-month-old case held improper when the trial court had indicated it would probably grant defendant's motion for judgment notwithstanding the verdict after two day trial); *Armstrong v. Frostie Company*, 453 F.2d 914, 916 (4th Cir. 1971) (motion for voluntary dismissal denied in light of advanced stage of proceedings where motion for summary judgment had been filed); *Shaffer v. Evans*, 263 F.2d 134, 135 (10th Cir. 1958), *cert. denied*, 359 U.S. 990 (1959) (denial of motion for voluntary dismissal proper where case pended for six months, numerous depositions were taken, defendant had made arrangements for medical testimony and case was ready for trial); *Bamdad Mechanic Co. v. United Technologies Corp.*, 109 F.R.D. 128, 131 (D. Del. 1985) (voluntary dismissal denied to preclude plaintiff from avoiding a meritorious defense); *Scallen v. Minnesota Vikings Football Club, Inc.*, 574 F. Supp. 278, 280 (D. Minn. 1983) (motion to dismiss without prejudice denied in view of defendant's trial preparation).

On the other hand, other cases have permitted Rule 41(a)(2) dismissals by ignoring the same factors. For example, in *Kern v. TXO Production Corp.*, 738 F.2d 968 (8th Cir. 1984), trial had begun, and plaintiff had presented four of five witnesses at trial. At that point, the court indicated that it would likely direct a verdict in the defendant's favor. Plaintiff moved for a voluntary dismissal, and the court granted the motion.

Although it had previously reversed a dismissal without prejudice granted after a verdict for the plaintiff, *Williams v. Ford Motor Credit Co.*, 627 F.2d 158 (8th Cir. 1980) (*see* n.6, *supra*), the Eighth Circuit nevertheless affirmed the court's ruling. It reasoned that the trial was not quite as advanced as that in *Williams*, because the plaintiff had not rested and there was therefore at least some chance that the plaintiff might have prevailed. 738 F.2d at 971.

Decisions like *Kern* and the holding below do not provide defendants the same protections afforded by cases such as *Ferguson v. Eakle*, *supra*, and *Paturzo v. Home Life Insurance Co.*, *supra*. They have permitted voluntary dismissals even when the litigation has proceeded close to (or is actually on) trial, the defendant has expended substantial resources in defense or the plaintiff has failed to provide a compelling reason for the dismissal.[7]

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[7] *McCants v. Ford Motor Co.* 781 F.2d 855, 857 (11th Cir. 1986) (dismissal of two-year-old case allowed even though defendant had conducted extensive discovery and filed a motion for summary judgment based on statute of limitations); *Puerto Rico Maritime Shipping Authority v. Leith*, 668 F.2d 46, 50 (1st Cir. 1981) (voluntary dismissal allowed even though parties had completed discovery, and defendant's motion to dismiss was pending); *Tyco Laboratories v. Koppers Co.*, 627 F.2d 54, 56 (7th Cir. 1980) (dismissal

(Footnote continued on following page)

In no other case have the factors weighing against a dismissal without prejudice been as strong as those in the present matter. The Seventh Circuit's ruling in the present case shows the stark inconsistency of the results, and even the rationales in support of those results in this area, and graphically demonstrates the need for guidance from this Court.

Acknowledging that Rule 41(a)(2) requires the plaintiff to provide a compelling reason for seeking a dismissal without prejudice, the government claimed that it needed to rid itself of this lawsuit before it could proceed with its cleanup. The Seventh Circuit ignored the requirements of Rule 41(a)(2) and uncritically accepted the government's reason, even though it makes no sense.

EPA did not need to dismiss this action in order to implement a cleanup. It could have implemented a cleanup while simultaneously proceeding against OMC for its cleanup costs by amending its complaint to seek those costs under Superfund § 107(a), 42 U.S.C. § 9607(a). At the government's urging, numerous courts have held such actions ripe as soon as the government has expended any money (including study costs) at a site, even though the cleanup is not even substantially completed.[8] The government

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[7] *continued*
without prejudice granted even though discovery had progressed for over a year, and motion for summary judgment was pending); *Durham v. Florida East Coast Railway Co.*, 385 F.2d 366, 368 (5th Cir. 1967) (voluntary dismissal proper even though the motion was made after pre-trial conference, the case had been called for trial, and the witnesses travelled long distances to attend); *Louis v. Bache Group, Inc.*, 92 F.R.D. 459, 461 (S.D.N.Y. 1981) (voluntary dismissal allowed based on precedents allowing dismissals on eve of trial).

[8] *See United States v. NEPACCO*, 579 F. Supp. 823, 852 (W.D. Mo. 1984); *United States v. Allied Chemical Corp.*, 587 F. Supp.

(Footnote continued on following page)

routinely brings and prosecutes cost-recovery actions at the earliest possible date to replenish the Superfund.

The § 107 case would normally have been merged into the present injunction case, because it is based on the same underlying factual allegations of environmental harm and the need for remedial action.[9] Had the district court granted OMC's motion to reconsider the denial of its previous motions to dismiss (*see* discussion at p. 5, *supra*, *and* App. D at D-6, *infra*), the dismissal would have been with prejudice to the cost-recovery action, unless the government added such a count.[10] The dismissal of the present case without prejudice thus deprived OMC of a rul-

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[8] *continued*
1205 (N.D. Cal. 1984); *Jones v. Inmont Corp.*, 584 F. Supp. 1425 (S.D. Ohio 1984); *United States v. Wade*, 577 F. Supp. 1326 (E.D. Pa. 1983); *State of Ohio ex rel. Brown v. Georgeoff*, 562 F. Supp. 1300, 1316 (N.D. Ohio 1983); *United States v. Reilly Tar & Chemical Corp.*, 546 F. Supp. 1100 (D. Minn. 1982).

[9] *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981) ("A final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action"); *Harper Plastics, Inc. v. Amoco Chemicals Corp.*, 657 F.2d 939, 945 (7th Cir. 1981) ("prior judgment is conclusive . . . as to every ground of recovery or defense which might have been presented"); *Manego v. Orleans Board of Trade*, 773 F.2d 1 (1st Cir. 1985), *cert. denied*, 106 S.Ct. 1466 (1986) (res judicata bars antitrust action premised on the same transaction as previously adjudicated civil rights action); *Olmstead v. Amoco Oil Co.*, 725 F.2d 627 (11th Cir. 1984) (res judicata "bar extends not only to the precise legal theory presented in the previous litigation, but to all legal theories and claims arising out of the same operative nucleus of fact"); Restatement of Judgments 2d, § 25 Comment d (1980).

[10] *Bunker Ramo Corp. v. United Business Forms, Inc.*, 713 F.2d 1272, 1277 (7th Cir. 1983). *See also Federated Dept. Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981); 1B Moore's Federal Practice ¶ 0.409 [1.—2] (1984).

ing on its motion, or of a trial, either of which would have disposed of the entire matter.[11]

The government's desire to dismiss this suit cannot, therefore, be explained by any need to perform a remedy. The only interest served by the dismissal was the government's desire to increase its damages before presenting its case to a court. The probable outcome of the government's present case is best evidenced by its record admissions in 1982 that it has no evidence of harm despite the presence of PCBs in Waukegan Harbor for the last 30 years. *See* discussion at p. 6, *supra*. The government hopes to compensate for this weakness in its factual case by not going to trial until *after* it has spent twenty or thirty million dollars on a remedy. To permit a dismissal in these circumstances would be to eviscerate the court's supervisory authority and to allow the plaintiff to dismiss for any reason.

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[11] The Seventh Circuit expressed doubts about whether a cost-revovery case could have been brought in the present action. The court referred to a body of cases holding that Superfund does not provide for "pre-enforcement review." App. A at A-16-17, *infra*.

"Pre-enforcement review" is a term that loosely refers to actions brought by persons responsible under Superfund for cleanup costs to enjoin the government's "enforcement"—*i.e.*, cleanup—until a court has reviewed the remedy and decided it can proceed. *Wheaton Industries v. United States Environmental Protection Agency*, 781 F.2d 354, 356 (3d Cir. 1986); *Lone Pine Steering Committee v. United States Environmental Protection Agency*, 777 F.2d 882, 886-88 (3d Cir. 1985), *cert. denied*, 106 S.Ct. 1970 (1986); *J.V. Peters & Co., Inc. v. Administrator, Environmental Protection Agency*, 767 F.2d 263, 265 (6th Cir. 1985). Those cases held that the Superfund Act does not authorize injunction actions against the government brought by potentially responsible parties.

The Seventh Circuit was incorrect in implying that this doctrine precludes a cost-recovery action before the remedy is complete. In fact, the government routinely brings such actions. *See* discussion at pp. 14-15, *supra*.

Not only did the Seventh Circuit fail to scrutinize the government's reasons for seeking a dismissal, it also completely negated the other standard for ruling on a Rule 41(a)(2) motion—the defendant's expense and effort in trial preparation. The Seventh Circuit stated that OMC's vigorous defense actually precluded it from opposing the government's Rule 41(a)(2) motion brought late in the case. (*See* discussion and quotation at pp. 8-9, *supra*). Thus, the court chastised OMC for wasting so much of the government's time in its defense.

It cannot be a basis for ignoring the prejudice to a defendant from a 41(a)(2) dismissal that the defendant defended himself too vigorously against the plaintiff's claims. OMC's defense of this case can hardly be termed frivolous. Its position has in fact been sustained on several occasions by this Court and by the Court of Appeals,[12] and, after reviewing OMC's motion, the district court expressed serious doubts about the very legal basis of the government's claims (*see* p. 5, *supra, and* App. D at D-6, *infra*). The government's environmentally unsound dredging project could force the relocation of OMC's operations near Waukegan Harbor, and expose its 2,000 employees to risks. If OMC is held liable for the costs of this wholly unnecessary operation, it could threaten the very financial viability of the company. In these extreme circumstances the government's dismissal for the sole and obvious purpose of strengthening its presently weak case cannot be justified by blaming OMC for not having capitulated at the outset.

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[12] *Outboard Marine Corporation v. Illinois*, 453 U.S. 917 (1981) (Mem.); *Outboard Marine Corporation v. Thomas*, 773 F.2d 883 (7th Cir. 1985); *State of Illinois v. Outboard Marine Corporation*, 680 F.2d 473 (7th Cir. 1982).

CONCLUSION

The Seventh Circuit's decision demonstrates that the constraints on voluntary dismissals under Rule 41(a)(2) are easily violated. The very factors which in some cases are cited to preclude a voluntary dismissal were in the present case distorted to support the government's abandonment of this case after seven years of extremely costly litigation. That action was carried out because the court gave no credence to OMC's legitimate interests. Instead, it deferred completely to the unsupported demands of a governmental agency, whose case had been discredited by the absence of evidence for its position and by its numerous changes of position. Rule 41(a)(2) does not permit the rights of a private litigant to be ignored merely because the plaintiff is a governmental agency.

Basic fairness, environmental considerations and interests in the effective administration of justice should have resulted in the denial of the government's motion to dismiss. Rule 41(a)(2) motions should not be granted when, as here, the defendant has been forced into extensive trial preparation, and when the plaintiff merely desires to improve his chances of success by vastly increasing his damages. This Court should allow this Petition for a Writ of

Certiorari to correct the error below and establish workable standards for deciding motions under Rule 41(a)(2).

Respectfully submitted,

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APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 85-1584

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

and

THE PEOPLE OF THE STATE OF ILLINOIS,

Intervenors-Appellees,

v.

OUTBOARD MARINE CORP.,

Defendant, Third-Party Plaintiff and Cross-Claim Defendant-Appellant,

and

MONSANTO COMPANY,

Defendant, Third-Party Defendant and Cross-Claim Intervenor-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 78 C 1004—**Susan Getzendanner,** *Judge.*

ARGUED DECEMBER 11, 1985—DECIDED APRIL 22, 1986

Before BAUER and COFFEY, *Circuit Judges,* and ESCHBACH, *Senior Circuit Judge.*

COFFEY, *Circuit Judge.* The appellants, Outboard Marine Corporation ("OMC") and Monsanto Company ("Monsanto") appeal a district court order granting the motion of the United States and the State of Illinois dismissing their action against the appellants without prejudice, pursuant to Fed. R. Civ. P. 41(a)(2),[1] on the condition that the United States and State of Illinois agree to execute a covenant not to again sue the appellants for injunctive relief. We affirm.

I

This case has a lengthy and tangled history spawning numerous decisions by this and other courts. *See Outboard Marine Corp. v. Illinois*, 453 U.S. 917 (1981) (Mem.); *Outboard Marine Corp. v. Thomas*, 773 F.2d 883 (7th Cir. 1985); *State of Illinois v. Outboard Marine Corp., Inc.*, 680 F.2d 473 (1982); *State of Illinois v. Outboard Marine Corp.*, 619 F.2d 623 (7th Cir. 1980). It is unfortunate that we are unable to write the final chapter at this time and thus the conclusion of this case will have to await another day.

A. Procedural History.

OMC manufactures outboard motors, industrial and turf care vehicles at its industrial complex located adjacent to the Waukegan Harbor in Waukegan, Illinois. In 1976, the

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[1] Fed. R. Civ. P. 41(a)(2) provides:

> "(2) *By Order of Court.* Except as provided in paragraph (1) of this subdivision of this rule, *an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper.* If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice." (Emphasis added).

government determined that an estimated 1.1 million pounds of polychlorinated biphenyles ("PCB") rested on the bed of the harbor and were caused by fluids discharged from the OMC plant. Monsanto had been selling the PCB based fluids to OMC for use in its production and manufacturing process.

In March, 1978, the United States Government filed a civil lawsuit against OMC requesting mandatory injunctive relief under the Refuse Act, 33 U.S.C. § 407 (Count I), the Clean Water Act, 33 U.S.C. § 1251 *et seq.* (Count II) and the federal common law tort of nuisance. The government sought to compel OMC to remove the PCB sediments from the Waukegan Harbor. In November, 1978, OMC filed a third-party complaint against Monsanto seeking contribution and indemnity if OMC was required to remove the PCB sediments. Subsequently, the United States amended its complaint in 1980 to include Monsanto as a defendant and at this time the State of Illinois was granted leave to intervene as a plaintiff in this action.[2]

In December, 1980, the President signed into law the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA") 42 U.S.C. § 9601

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[2] The State of Illinois' intervention into this case was not by agreement but with some acrimony. As noted by the district court:

> "Illinois moved to intervene in this action, but its motion was denied by order dated May 29, 1979. Illinois appealed, and the Court of Appeals held that Illinois could intervene as of statutory right. *State of Illinois v. Outboard Marine Corporation*, 680 F.2d 473, 480-81 (7th Cir. 1982); *see also State of Illinois v. Outboard Marine Corporation*, 619 F.2d 623, 630-32 (7th Cir. 1980), *vacated and remanded*, 453 U.S. 917, 101 S. Ct. 3152, 69 L. Ed. 2d 1000 (1981). Illinois has also filed its own action, which the court dismissed without prejudice because it duplicated Illinois' claims in this action. *State of Illinois v. Outboard Marine Corporation*, No. 78 C 3187 (N.D. Ill. Sept. 30, 1982)."

United States v. Outboard Marine Corp., 104 F.R.D. 405, 414 (N.D. Ill. 1984).

et seq., better known as the "Superfund" Act, authorizing the Environmental Protection Agency ("EPA") to take action to clean up hazardous waste sites. Pursuant to section 106 of CERCLA, 42 U.S.C. § 9604, the EPA is authorized to file an action in federal court to "secure such relief as may be necessary" if the agency "determines that there may be an *imminent* and *substantial endangerment* to the public health or welfare or the environment because of an actual threatened release of a hazardous substance from the facility . . . ." On January 6, 1982, the EPA filed its final amended complaint including, along with its other claims based on the federal statutes and federal common law theories of liability, a claim under section 106 of CERCLA requesting that the court order OMC and Monsanto to remove the PCB from the Waukegan Harbor. In September of 1982, in response to the appellants' request for admissions of fact, the government stated that it had no scientific concrete proof, at that point in time, that the PCB in the Waukegan Harbor had caused harm to any human being. It is important to note that the government did not admit that the PCB would not present a potential threat to human beings in the future; nor did the government admit that the PCB in the harbor would not pose a risk of future significant environmental damage to the environs of the harbor, Lake Michigan and the fish and aquatic life in that area.[3]

On May 24, 1982, the district court granted OMC's and Monsanto's motion to dismiss the federal common law nuisance claims in light of the Supreme Court's decision in *Milwaukee v. Illinois*, 451 U.S. 304 (1981) (holding that the federal common law nuisance action was preempted by the Federal Water Pollution Control Act Amendments of 1972), and granted Monsanto's motion to dismiss all other claims of the United States against Monsanto. *See*

[3] PCB is listed as a toxic pollutant pursuant to section 307(a) of the Clean Water Act, 40 C.F.R. 129.4, and is designated as a hazardous substance pursuant to section 311 of the Clean Water Act, 40 C.F.R. 116.4.

United States v. Outboard Marine Corp., 549 F. Supp. 1032 (N.D. Ill. 1982). The district court refused to dismiss the Refuse Act and the Clean Water Act claims against OMC (Counts I and II) holding that these statutes authorized the government to seek injunctive relief for the removal of the hazardous substances, such as PCB, from the Waukegan Harbor. *See United States v. Outboard Marine Corp.*, 549 F. Supp. 1036 (N.D. Ill. 1982). The district court also refused to dismiss the section 106 CERCLA claim against OMC. *United States v. Outboard Marine Corp.*, 556 F. Supp. 54 (N.D. Ill. 1982).[4]

On November 10, 1982, OMC filed a motion requesting the district court to reconsider its order denying OMC's motion to dismiss the Refuse Act, the Clean Water Act and the Section 106(a) CERCLA claims. In response to this motion, the district court judge noted that she had "about a sixty percent comfort in my prior opinion" and set a hearing date on OMC's motion. District Court Hearing November 12, 1982 at 12-13.

Subsequently, in December, 1982, the EPA published its initial National Priority List ("NPL") and ranked the Waukegan harbor 82nd of 540 hazardous waste sites included on the NPL. Shortly thereafter the State of Illinois designated the Waukegan harbor as its top priority "Superfund" site.[5] At this time in the litigation history

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[4] OMC alleged that CERCLA section 106 was merely a jurisdictional statute that did not provide for substantive liability; and, assuming that the statute did allow for substantiative injunctive relief, the EPA had failed to plead sufficient facts to establish that the presence of PCB in the Waukegan harbor posed an "imminent and substantial endangerment" within the meaning of the statute. The district court, however, rejected each of these arguments.

[5] The NPL is based upon Hazard Ranking System ("HRS") that represents a composite score that is "used in evaluating the relative potential of uncontrolled hazardous substances facilities to cause health or safety problems, or ecological or environmental damage." 47 Fed. Reg. 31220 (1982).

of this case, the United States determined that given the amount of discovery still to be completed before trial, and the fact that the anticipated lengthy trial and the subsequent appeal "will likely delay the implementation of remedial work at the OMC site and in Waukegan harbor for an additional three to four years," the most expeditious manner in which to clean up the PCB now resting on the bed of the Waukegan harbor would be for the government to remove the PCB, as authorized by section 104 of CERCLA, 42 U.S.C. § 9604, and later sue for the removal and cleanup costs pursuant to section 107 of CERCLA, 42 U.S.C. § 9607. On February 25, 1983, the United States filed a motion with the court to dismiss its claim under section 106 of CERCLA without prejudice; and on March 22, 1983 the government filed a motion requesting that the court stay the remainder of injunctive relief action pending the completion of the EPA administrative proceedings under CERCLA. The appellants objected to the stay and the proposed dismissal of the action without prejudice contending, as they do on appeal, that the true reason the government commenced the administrative proceedings under CERCLA was that it would be unable to establish its claims at trial. Subsequently the parties agreed to ask the district court to stay the consideration of these motions until after the EPA had issued its final plan concerning the proposed cleanup of the Waukegan harbor. The district court granted the motion to stay the proceedings. During the next year, from March, 1983 to May, 1984, the EPA proceeded with its administrative hearings and procedures, and conducted feasibility studies into the cleanup of the Waukegan harbor.[6] On May 15, 1984, the EPA issued its Record of Decision ("ROD") selecting as the appropriate remedy (given the limited availability of federal funds) a $21 million removal effort involving the dredging of the harbor with both off-site and

[6] The appellants participated in this administrative process, attending the public meetings and submitting their views during the respective comment periods.

on-site storage of the PCB contaminated sediments.[7] On May 21, 1984, approximately one week after the issuance of the ROD, the United States filed a motion with the district court, pursuant to Fed. R. Civ. P. 41(a)(2), requesting that its complaint be dismissed without prejudice as it had decided that when balancing the years of anticipated litigation concerning the issue of injunctive relief against the need for immediate removal of the PCBs from the harbor, the scales of justice were definitely tilted in favor of the government proceeding without delay to remove the PCB pursuant to the authority granted the government in CERCLA section 104 and later sue for reimbursement of the removal costs under CERCLA section 107. Both OMC's and Monsanto's briefs, filed with the court opposing the motion to dismiss, argued that it would be improper to dismiss the case without prejudice at this late stage in the litigation given the amount of money already expended in preparation for trial; they also attacked the proposed remedy recommended in the EPA's R.O.D. and the alleged weakness of the government's evidence as to the harm caused by the PCB. OMC and Monsanto requested the court to either set the case for trial on the issue of the alleged harm caused by the PCB and the cost-effectiveness of the proposed solution or, in the alternative, dismiss the case with prejudice.

B. District Court Decision.

The district court determined that "[t]his litigation undoubtedly has been very costly for the parties to litigate" and thus "[t]he United States should not be permitted, at some future time, to move backward and return to its original approach to the problem." *United States v. Outboard Marine Corp.*, 104 F.R.D. 405, 410 (N.D. Ill. 1984). The district court initially dismissed the counts contained in the government's complaint requesting injunctive relief

[7] The on-site designation meant that the PCB removed from the harbor would be stored on OMC's property; while the remainder would be stored at another location, not on OMC's property.

with prejudice, but with the caveat that dismissal would be "without prejudice to a future cost-recovery suit," in the event the government should decide to commence such an action. *Id.* at 410-11. The district court also rejected OMC's and Monsanto's request for a bifurcated trial on the issues of the extent of harm inflicted from the presence of PCBs in the Waukegan harbor and the proposed removal remedy ruling that this would necessitate a pre-removal judicial review of the EPA's Record of Decision. The court found that such review is not contemplated in the statutory scheme of CERCLA, sections 104 and 107, until such time as the United States sues for recovery of the sums expended for the removal of the PCB. *Id.* at 411. The court also noted that even if it denied the government's motion to dismiss the injunctive action, and ruled in favor of OMC on its motion to reconsider the dismissal of the government injunctive relief claims, this "would not bar [the government from pursuing] a future cost recovery action" since this claim "could not have been brought in this [injunctive relief] action" and "the court does not understand the OMC or Monsanto to argue otherwise." *Id.* at 410-411. The court further stated that even if it allowed the case to proceed to trial, resolution of the section 106 CERCLA claim in OMC's favor would not bar a subsequent cost recovery action since the requirements of establishing liability under the respective statutes are vastly different and totally unrelated. *Id.* at 412.[8]

After publication of the decision dismissing the claims for injunctive relief, Outboard Marine Corporation filed a motion with the court to reconsider its ruling arguing that the dismissal of the injunctive counts in the government's complaint with prejudice barred the cost recovery suit based upon the principles of *res judicata.* In its mo-

[8] CERCLA section 106 requires that there be "an imminent and substantial endangerment to public health or welfare or the environment"; on the other hand, CERCLA sections 104 and 107 do not contain this requirement.

tion responding to OMC's request for reconsideration, the United States suggested that in order to preserve the intent of the district court's decision and "to avoid any question of *res judicata* effect on the cost-recovery claim, while still protecting defendants from repetitive litigation" the court should dismiss the government's action requesting injunctive relief and civil penalties without prejudice "on the condition that the government stipulate to refrain from reinstating the pending claims for injunctive relief and penalties asserted in Second Amended Complaint." The district court adopted this recommendation and dismissed the suit without prejudice conditioned upon the United States and the State of Illinois each executing a covenant not to sue the appellants except for a possible cost-recovery action arising from the presence and removal of PCB in the Waukegan harbor.

The issue on appeal is whether the district court abused its discretion in dismissing this action without prejudice on the basis that the United States and the State of Illinois execute a covenant not to sue OMC for injunctive relief.

II

The dismissal of the plaintiff's complaint without prejudice, pursuant to Fed. R. Civ. P. 41(a)(2), is within the sound discretion of the district court and may be reversed only if the appellant demonstrates the district court abused its discretion. *Tyco Laboratories, Inc. v. Koppers Co., Inc.*, 627 F.2d 54 (7th Cir. 1980); *Stern v. Barnett*, 452 F.2d 211, 213 (7th Cir. 1971); 9 C. Wright & A. Miller, Federal Practice & Procedure § 2364, at 161-62 (1971). The district court abuses its discretion only when it can be established the defendant will suffer "plain legal prejudice" as the result of the district court's dismissal of the plaintiff's action. *See Stern*, 627 F.2d at 56. In *Pace v. Southern Express Co.*, 409 F.2d 331 (7th Cir. 1969), we delineated several factors for courts to consider in determining whether

the defendant has suffered "legal prejudice" as a result of the dismissal of an action without prejudice.

> "[T]he defendant's effort and expense of preparation for trial, excessive delay and lack of diligence on the part of the plaintiff in prosecuting the action, insufficient explanation for the need to take a dismissal, and the fact that a motion for summary judgment has been filed by the defendant."

Id. at 334. However, as we noted in *Stern*, "[t]he enumeration of factors to be considered in *Pace* is not the equivalent to a mandate that each and every factor be resolved in favor of the moving party before dismissal is appropriate. It is rather simply a guide for the trial judge, in whom the discretion ultimately rests." *Stern*, 627 F.2d at 56. As noted in *Kern v. TXO Production Corp.*, 738 F.2d 968 (8th Cir. 1984), "[t]he very concept of discretion presupposes a zone of choice within which the trial court may go either way [in granting or denying the motion]." *Id.* at 971. The issue before this court is whether the district court abused its discretion in dismissing this action without prejudice or whether the court's decision fell within the permissible "zone of choice" available to a district court properly exercising its discretion.

1. Justification for dismissal without prejudice.

As noted in *Pace*, the court may consider the plaintiff's proffered excuse in its assessment of whether the dismissal without prejudice is proper. *See also Tyco Laboratories, Inc.*, 627 F.2d at 57. Appellants initially argue that the government has failed to provide sufficient justification for pursuing its present remedy of removing the PCB sediments and later suing to recover the costs resulting from the removal rather than pursuing the action then pending seeking injunctive relief. Specifically, they note that since 1972 the government has had the authority under the Clean Water Act to remove the PCB and sue the responsible party for the removal costs, *see* 33 U.S.C. §§ 1259, 1265 and 1321, yet the EPA has consciously

decided to bypass this route in favor of suing for injunctive relief requiring OMC to remove the PCB from the Waukegan harbor. Appellants also argue that the true reason "for EPA's change of position is that this litigation has disclosed the weakness of [the government's] position on both the legal and factual issues . . ." in this case. OMC's Br. at 25. In regard to the legal issue, OMC states that "[a]s the district court indicated in its August 30 opinion, OMC's motion to reconsider the court's denial of its previous motion to dismiss presented potentially dispositive arguments against the court's prior rulings," and thus OMC maintains that the court's August 30 opinion revealed to the government that it was in danger of having its injunctive relief action dismissed on the basis of OMC's legal arguments. OMC also states that the "factual case fared no better" since the EPA would have been unable to prove at trial that the PCB resting on the bed of the harbor posed an immediate threat to human health or that any alleged harm justified the anticipated cost of removal. *Id.* at 25-26.

The appellants essentially charge that the government was afraid it would be unable to prevail at trial and thus was acting with less than a sincere motive in requesting that the court dismiss its action without prejudice in order that it might remove the PCB from the harbor and later sue for the cost of removal. From our review of the record we are convinced that balancing the delay pending the years of anticipated litigation over injunctive relief against the overwhelming interest of the government in protecting the environment from further irreparable damage to the water and marine life and in protecting citizens from the potential harmful effects of PCB (for example, eating salmon or other fish contaminated with PCB) justifies the government's decision to proceed with the immediate removal of the PCB sediments and possibly sue at a later date for the removal costs. Specifically, in December 1982, the EPA published its National Priority List and ranked the Waukegan harbor 82nd out of 540 hazardous waste sites throughout the United States. The

State of Illinois EPA designated the harbor as the top priority hazardous waste site located in the State of Illinois. Given this level of priority established by two public agencies with expertise in environmental problems, the EPA determined that it would be in the public interest to implement the immediate removal of the PCB sediments from the harbor rather than waiting for this case to proceed through the anticipated prolonged litigation process of years upon years. For this reason, the United States requested a stay of this action in early 1983, and commenced the required administrative proceedings, authorized under 42 U.S.C. § 9604(b), before proceeding with the cleanup of the harbor. Once the administrative process was completed, the EPA issued its ROD in May 1984 and moved the court for a dismissal of its actions seeking injunctive relief.

The appellants argue that the government was empowered to clean up the harbor and then sue for the removal costs pursuant to the provisions contained in the Clean Water Act and thus we should reject the government's reasons for pursuing its own cleanup action under the new Superfund Act, CERCLA. The Congress has given the EPA the discretion to determine how best to economically and feasibly expend the government's limited resources in remedying the pollution problems at the hazardous waste sites. CERCLA was enacted in order to provide the required funds to enable that the EPA to act promptly to remove the hazardous waste. *See* S. Rep. No. 96-848, 96th Cong., 2d Sess. 8. Congress even recognized that the remedial cost to clean up all the potential hazardous waste sites in the country far exceeded the amount of funds allocated to the Superfund. *State of Ohio v. Georgeoff*, 562 F. Supp. 1300, 1313 (N.D. Ohio 1983) (citing comments in the Congressional record noting that the anticipated cost of cleanup of the toxic waste sites far exceeded the amount of money allocated to the Superfund). Thus, given the limited funds available for the clean up of the hazardous waste sites, the government would certainly prefer that the responsible parties clean up the site in the most

expeditious manner rather than saddle the taxpayers with the expense of removing the hazardous waste dumped into the harbor by OMC and Monsanto until such time as the government might bring an action to collect the funds from the responsible party for the cleanup. The EPA possessed the discretion to decide that the gravity of the problem (as revealed by the NPL and Illinois ranking given the Waukegan harbor site) necessitated immediate action and that it would be in the public interest to expend government resources to remove the PCB sediment rather than wait for the endless litigation of this case to take its natural course.

Further, we are puzzled by the appellant's contention that the government has not offered a legitimate reason for requesting a dismissal without prejudice (except for the covenant not to sue), arguing that the government could have cleaned up the PCB pursuant to the Clean Water Act. Essentially the appellants infer that the government could have already removed the PCB pursuant to the Clean Water Act and that if it had, the parties would not be in their present position, namely—still in court, not having as of this time gone to trial, and the PCB not having as of this time been removed from the harbor. The appellants have fought the government every possible inch of the way for over six years in court concerning the validity of the proposed injunctive relief action and whether the State of Illinois was a proper party to this action. A major reason why the PCB problem has not been resolved at this point in time is the continuous and protracted litigation of this case. While we do not fault the appellants for exercising their constitutional right to defend this action in the manner they believe is most appropriate, it is "too late in the day" for them to complain that they somehow have been prejudiced by the delay in this case in proceeding to trial for they actively participated in this litigation nightmare which we are sad to say is far from its final chapter. It was the protracted litigation of this case, and the anticipated lengthy appeals process sure to follow a trial on

the injunctive relief claims, that caused the government to request the court to dismiss this action in order that it might proceed to clean up the potentially dangerous PCB and sue for the costs at a later point in time. Thus, the government has offered a legitimate reason for its abandonment of its injunctive relief action in favor of pursuing its remedies under sections 104 and 107 of CERCLA.

Monsanto, in its brief, explicitly argues that the government's motion to dismiss "comes after excessive delay and lack of diligence." Monsanto Br. at 18. However, Monsanto has failed to point to any specific instances in the record from which this court might conclude that the United States government acted in bad faith or caused unwarranted delays in this case. Further, as noted above, part of the delay in this case was caused by the defendants challenging the State of Illinois intervention before the district court and this court, fighting the government's theory that it could bring an action for injunctive relief, and agreeing with the government that this case should be stayed pending the results of the EPA administrative studies hearings (that lasted well over a year). Thus, they knowingly and actively participated in the delay by contesting the government's position taken throughout this litigation, obviously in the hope of postponing the day of reckoning as long as possible. The argument that the government caused the "excessive delay" in this case is without merit.

2. Pending disposition of this case.

Appellants also argue that had the government not been allowed to dismiss this case without prejudice, OMC may have been able to obtain a ruling from the district court dismissing the government's action seeking injunctive relief for failure to state a claim. This argument, however, is at best highly speculative and conjectural. The appellants rely on *Pace v. Southern Express Company*, 409 F.2d 331 (1969), where we held that the district court

abused its discretion in dismissing the plaintiffs' action without prejudice where it was apparent that the defendant was entitled to summary judgment since the plaintiff had failed to file a response to the defendant's summary judgment motion. In this case, the district court expressed a "sixty percent comfort" in its prior rulings holding that the United States had a proper claim for injunctive relief under the Refuse Act, Clean Water Act and section 106 of CERCLA. Thus from our review of the record, including the district court's comments, we certainly are far from convinced that the appellants would have obtained a favorable ruling from the district court. Further, the government agreed to execute a covenant not to sue for any claims other than the recovery of the cleanup costs, as a condition of dismissal, and thus is prevented from again bringing another action seeking the same injunctive relief and civil penalties in this fact situation. The appellants have, in effect, achieved their purpose in having the injunctive relief claims dismissed.

The appellants also argue that had this case proceeded to trial, they would have prevailed since the government did not have evidence sufficient to establish that the PCB in the Waukegan harbor was causing harm sufficient to justify the expected cost of the removal of the PCB from the harbor. Specifically, the appellants point to the government's admission in September 1982 that the government knew of no person who had as of that point in time suffered any ailments due to the PCB in the harbor. Since our standard of review in this case requires that we affirm the district court decision unless we find "that the discretion of the trial judge was abused" in dismissing this action without prejudice on the condition that the government execute a covenant not to sue for injunctive relief, *Tyco Laboratories, Inc.*, 627 F.2d at 56, we are not in the position to assess the relative merits of either the appellant's or the government's position as to the alleged harm, or anticipated future harm, caused by the PCB in

the harbor.[9] But it is important to note that while the government did admit that it did not have scientific evidence at that particular point in time that the PCB in the harbor had caused harm to humans, it did not admit that the PCB then present would not cause a significant health problem to humans in the future, or that the PCB did not present a present risk to the ecological life of the harbor or Lake Michigan, or that the PCB will not harm the fish and aquatic life in the area.

Further, even if we acceded to the appellant's request and reversed the district court's decision to dismiss this case without prejudice and the court, on remand, allowed this case to proceed to trial, we have serious doubts as to whether a trial on the claims presently before the court would be proper since the government has commenced its cleanup effort. Specifically, the government's complaint asked for injunctive relief requesting that the appellants be directed to remove the PCB sediments from the bed of the harbor immediately; but because of the extensive litigation and the serious problems (potential harm to humans and the environment in the future) posed by the contaminated waste in the water, the government commenced the process of removing the PCB sediments from the harbor. *See Outboard Marine Corp. v. Thomas*, 773 F.2d 883 (7th Cir. 1985). Thus, there no longer exists a valid reason for the requested injunctive relief. Conversely, if the government decides to wait until after the proposed trial to commence the removal operation, a serious question would exist as to the district court's jurisdiction over the merits of the appellant's case that the cost of the government's proposed remedy was not justified by the alleged harm presented by the PCB in the Waukegan harbor. Courts that have addressed the issue of a trial court's jurisdiction to review the appropriateness of the

[9] Indeed, the parties have not presented the administrative record or a summary of the evidence collected to this date concerning the potential harm that may be caused by the PCB.

EPA's removal efforts have held that CERCLA does not authorize pre-enforcement judicial review of the EPA's R.O.D. CERCLA does not give the United States District Courts jurisdiction to review the EPA's R.O.D. prior to enforcement. Rather, these courts have held that the jurisdiction rests with the trial court only after the EPA has enforced the R.O.D. and the government subsequenty sues under CERCLA section 107, 42 U.S.C. § 9607, to recover the cleanup costs incurred in enforcing the R.O.D. *Wheaton Industries v. U.S. E.P.A.*, 781 F.2d 354, 356 (3d Cir. 1986) (citing *Lone Pine Steering Committee v. U.S. E.P.A.*, 777 F.2d 882 (3d Cir. 1985) for the proposition that "judicial review is not available under CERCLA until the EPA files suit for reimbursement of its costs, as authorized by section 107, CERCLA, 42 U.S.C. § 9607."); *see also J.V. Peters & Co., Inc. v. U.S. E.P.A.*, 767 F.2d 263, 265 (6th Cir. 1985).

Finally, the appellants will not be deprived of any defense if the EPA later sues for recovery of its removal costs and thus will not be prejudiced if the government subsequently brings a cost recovery action.[10] *See Puerto Rico Maritime Shipping Authority v. Leith*, 668 F.2d 46, 50 (1st Cir. 1980). It appears from the record that had the injunctive relief action proceeded to trial the appellants might have argued in their defense that any alleged harm from the PCB in the Waukegan harbor did not justify the anticipated cost of removal. Section 107(a), 42 U.S.C. § 9607(a), (authorizing the government to remove the hazardous waste) states that the party responsible for the presence of the hazardous waste shall bear the cost of removal "not inconsistent with the national contingency plan." The national contingency plan is described in 42 U.S.C. § 9605 and requires that the remedial action

[10] Indeed, the parties recognized at oral argument that the appellants' defenses that would have been asserted at the trial assessing the appropriateness of the government's request for injunctive relief would be available if, or when, the government sues for recovery of its cleanup costs.

taken by the government be cost-effective. 42 U.S.C. § 9605(7). Thus, the procedure used by the government to recover its cleanup costs pursuant to section 107(a), 42 U.S.C. § 9607(a), will permit the appellants to raise a cost-effectiveness defense should they desire.

3. Effort and expense in preparing for trial.

The appellants also argue that they have been "put to extraordinary expense and effort" in defending this lawsuit for the past seven and one-half years. While we note that the appellants have incurred substantial costs and attorney fees in defending this action,[11] the district court did impose conditions on the parties to the dismissal in order to minimize the cost to the appellants. Specifically, the court awarded Monsanto and OMC costs, pursuant to 28 U.S.C. § 2412(a) in the amount of $45,138 and $68,893, respectively.[12] Further, the court granted the government's motion to dismiss its complaint without prejudice only upon the condition that the government and the State of Illinois each execute a covenant not to sue for the counts contained in its complaint; thus, the defendants will not again be forced to litigate the claims seeking injunctive relief. Since the materials accumulated during

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[11] As previously noted, the "cause" of the expense and effort put forth by the appellants cannot exclusively be attributed to the federal government.

[12] The court awarded costs to OMC pursuant to 28 U.S.C. § 2412(a), noting that courts have held a voluntary dismissal without prejudice is tantamount to a judgment for the defendant for purposes of awarding costs. *See* C. Wright & A. Miller, *Federal Practice and Procedure*, 179-80 (1978). The court awarded costs to Monsanto as a prevailing party since it had earlier been dismissed as a defendant. *See United States v. Outboard Marine Corp.*, 549 F. Supp. 1032 (N.D. Ill. 1982). The court, however, noted that it may have to require a downward adjustment of this cost award if the appellants are able to use the information acquired through discovery to defend themselves at the cost-recovery trial.

discovery and the administrative process are not contained in the record we are unable to determine which of these materials may be of use to the defendants should the government commence an action for the recovery of the removal costs. But the parties agreed at oral argument that the anticipated defense at the cost recovery trial would be similar to the defense that would have been employed at the trial for injunctive relief. Thus the appellants' work product might very well be useful if and when the government brings its action for recovery of removal costs and the appellants' efforts and expenses incurred in preparing for the injunctive relief trial will not have been wasted. *See Puerto Rico Maritime Shipping Authority*, 668 F.2d at 50; *cf. Cauley v. Wilson*, 754 F.2d 769, 772 (7th Cir. 1985).

4. Unfavorable publicity.

The appellants finally argue that for years they have been forced to endure the unfavorable publicity surrounding the allegations that they are responsible for the PCBs in the Waukegan harbor, and contend that the government's voluntary dismissal "on the eve of trial eliminated [their] chance[ ] to obtain a fair hearing on the accusations." OMC Br. at 24. This argument is speculative and, at best, a red herring. The district court correctly noted that "[t]his concern, while its importance should not be underestimated, is not sufficient to justify an unwarranted trial" at this stage of the proceedings. *Outboard Marine Corp.*, 104 F.R.D. at 413; *see also Louis v. Bache Group, Inc.*, 92 F.R.D. 459, 461 (S.D.N.Y. 1981). Further, the appellants have failed to provide this court with evidence in the record demonstrating how they have suffered due to any unfavorable publicity surrounding this litigation. Even if we were to accept this assertion of unfavorable publicity, as noted in this opinion the district court is granted wide latitude in determining whether or not to grant a motion to dismiss without prejudice and we cannot state that the district court abused its discretion simply because the parties, Monsanto and OMC, who caused the

PCB problem in the harbor, may suffer unfavorable publicity. Obviously, the courts cannot exercise control over the media when it exercises its First Amendment Free Press right to inform the public of the potential harm arising from the hazardous waste in the harbor. If the appellants are upset with the press' coverage of this matter, they can present this argument to the press after the cost recovery trial.

After reviewing the record in this case, we hold that the district court did not abuse its discretion in dismissing the government's action without prejudice on the condition that the government and the State of Illinois execute a covenant not to sue for injunctive relief or civil penalties.

III

In the last section of its brief, OMC contends that the district court's "modification of its initial dismissal with prejudice violated Rule 41(a)(2) and was an abuse of discretion." OMC Br. at 29. OMC notes that because of the expense of litigating this case, the district court initially refused to grant the government's motion to dismiss without prejudice. Rather, the court stated that the dismissal would be with prejudice as to the claims contained in the government's complaint but that the dismissal would not affect the government's subsequent cost-recovery action since this claim "could not have been brought in this [injuctive relief] action." *Outboard Marine Corporation Co.*, 104 F.R.D. at 411. Citing a line of cases holding that the government may bring an action seeking recovery of costs for the removal of hazardous waste as soon as it has incurred its initial cleanup costs,[13] OMC argues that the district court erred when it assumed that the cost-recovery action could not have been brought by the government

[13] OMC cites *New York v. General Electric Co.*, 21 E.R.C. 1097 (N.D.N.Y. 1984) and *United States v. Allied Chemical Corp.*, 587 F. Supp. 1205 (N.D. Cal. 1984).

when it filed its second amended complaint requesting injunctive relief since the government had already incurred costs that could be recovered under § 107 of CERCLA. The appellants also argue a claim for injunctive relief under section 106 and a claim for recovery of costs under section 107 of CERCLA are the same for purposes of *res judicata* analysis. Thus, OMC argues that "any dismissal of this case under Rule 41 must be with prejudice [and] [s]uch dismissal would have to include a cost-recovery action under Superfund § 107." OMC Br. at 29. Although the position taken by OMC in its brief is not entirely clear, we interpret OMC as requesting that we reverse the district court decision to dismiss without prejudice, reinstate its original order dismissing this case with prejudice, and dismiss the entire action holding that the anticipated cost-recovery action is precluded by the rules of *res judicata*.

From our review of the totality of the record in this proceeding, the district court's original opinion dismissing this action with prejudice, except for the reservation allowing the government to pursue a future cost-recovery action, and the court's subsequent modification of that decision to dismiss the government's complaint without prejudice on the condition that the government execute a covenant not to sue, it is evident that the intent of the district court was to prevent the government from changing the course of litigation and again seeking the same type of injunctive relief from the appellants in the same fact situation. The court obviously had no intention of preventing the government from later seeking recovery costs incurred in the removal of the PCB's from the Waukegan harbor; thus saving the taxpayers from being saddled with the interim cleanup expense. The mere fact that the district court allowed the government to later pursue this second action seeking recovery costs is not in and of itself prejudicial to the defendants. *See Quad/Graphics, Inc. v. Fass*, 724 F.2d 1230, 1233 (7th Cir. 1983); *Puerto Rico Maritime Shipping Authority*, 668 F.2d at 50; *Sterns*, 542 F.2d at 214 (noting that "the prospect of

a second lawsuit should not [in and of itself] bar a voluntary dismissal . . . ."); *cf.* Restatement of Judgment (Second), § 26(1)(b) (noting that the principles of *res judicata* do not apply when the "court in the first action has expressly reserved the plaintiff's right to maintain the second action . . . .").

Since the district court's final decision was to dismiss this action without prejudice upon the condition that the government and the State of Illinois execute a covenant not to sue for injunctive relief based upon the same fact situation, to reach the *res judicata* issue we would initially have to hold that the district court abused its discretion in dismissing the complaint without prejudice before reaching the issue of whether the dismissal with prejudice of the section 106 CERCLA claim would bar the section 107 cost recovery action. We previously held that the court did not abuse its discretion; thus, we need not reach the issue of whether the section 107 cost recovery action would be barred by *res judicata*. Further, since the district court never explicitly ruled on the *res judicata* issue as to the interrelationship between section 106 and 107, this issue is not properly before this court at this time.

The decision of the district court is AFFIRMED and costs are awarded to the government on this appeal.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

JUDGMENT — ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

April 22, 1986.

Before

Hon. WILLIAM J. BAUER, *Circuit Judge*
Hon. JOHN L. COFFEY, *Circuit Judge*
Hon. JESSE E. ESCHBACH, *Senior Circuit Judge*

No. 85-1584

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

and

THE PEOPLE OF THE STATE OF ILLINOIS,
Intervenors-Appellees,

vs.

OUTBOARD MARINE CORPORATION,
Defendant, Third-Party Plaintiff and Cross-Claim Defendant-Appellant,

and

MONSANTO COMPANY,
Defendant, Third-Party Defendant and Cross-Claim Intervenor-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 78 C 1004—**Susan Getzendanner**, *Judge.*

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby AFFIRMED, with costs awarded to the Government, in accordance with the opinion of this Court filed this date.

APPENDIX C

JUDGMENT — ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

May 22, 1986.

Before

Hon. WILLIAM J. BAUER, *Circuit Judge*
Hon. JOHN L. COFFEY, *Circuit Judge*
Hon. JESSE E. ESCHBACH, *Senior Circuit Judge*

No. 85-1584

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

and

THE PEOPLE OF THE STATE OF ILLINOIS,
Intervenors-Appellees,

vs.

OUTBOARD MARINE CORPORATION,
Defendant, Third-Party Plaintiff and Cross-Claim Defendant-Appellant,

and

MONSANTO COMPANY,
Defendant, Third-Party Defendant and Cross-Claim Intervenor-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 78 C 1004—**Susan Getzendanner**, *Judge.*

ORDER

The Opinion of this court issued on April 22, 1986 in the above-referenced case is amended as follows:

Page 9, fourth line from the top, "affect" should be "effect";

Page 11, eight lines from bottom "affects" should be "effects";

Page 19, fourteen lines from the bottom, "which" should be "while."

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by appellant, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

APPENDIX D

UNITED STATES of America, Plaintiff,

and

The People of the State of
Illinois, Intervenors,

v.

OUTBOARD MARINE CORPORATION,
Defendant, Third-Party Plaintiff, and
Cross-Claim Defendant,

and

Monsanto Company, Defendant,
Third-Party Defendant, and
Cross-Claim Plaintiff.

No. 78 C 1004.

United States District Court,
N.D. Illinois, E.D.

Aug. 30, 1984.

MEMORANDUM OPINION AND ORDER

GETZENDANNER, District Judge:

This water pollution suit involves an accumulation of polychlorinated biphenyls ("PCBs") in the Waukegan Harbor and other navigable waters adjacent to the Waukegan, Illinois facility of the Outboard Marine Corporation ("OMC"). The PCBs allegedly were discharged from OMC's facility, and they allegedly came from PCB-bearing industrial fluids sold to OMC by Monsanto Company. The United States has sought an injunction requiring OMC and Monsanto to clean up the Waukegan Harbor. After several years of litigation, however, the United States has decided to clean the Harbor up by itself (along with inter-

venor the State of Illinois), intending to file another suit at a later date to recover the costs of the cleanup. The United States, joined by Illinois, now seeks dismissal of this action. OMC and Monsanto oppose dismissal, OMC asking alternatively that the case be dismissed with prejudice. As explained more fully below, the court will dismiss this action, and dismissal shall be with prejudice generally, but without prejudice to a future suit to recover the costs of cleaning up the Harbor. The court's ruling does not constitute an endorsement of the proposed cleanup plan, but rather is based on an acknowledgment that the United States can proceed with cleanup operations without obtaining prior court approval.

I. BACKGROUND

The United States filed suit against OMC on March 17, 1978. OMC brought Monsanto in as a third-party defendant on November 16, 1978, and on July 22, 1980 the United States filed its Amended Complaint, which asserted claims directly against Monsanto. The United States' claims against Monsanto have been dismissed, but OMC's third-party claims remain alive, as do cross-claims which Monsanto has asserted against OMC. The State of Illinois is party to the case as intervenor, but for simplicity's sake the court will defer discussion of Illinois' role until the end of this opinion.

The United States' current complaint is its Second Amended Complaint, which it filed on February 2, 1982, for the purpose of adding a count against OMC under § 106(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA" or "Superfund"), 42 U.S.C. § 9606(a). The Second Amended Complaint contains seven counts, four of which have been dismissed for failure to state a claim upon which relief can be granted. Counts III (asserted against OMC) and V (asserted against Monsanto), brought under the federal common law of nuisance, were dismissed by order dated May 24, 1982. Counts VI and VII, asserting claims against

Monsanto under the Illinois common law of products liability and under the Refuse Act, § 13 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 407, were dismissed by order dated September 20, 1982. *United States v. Outboard Marine Corporation*, 549 F.Supp. 1032 (N.D. Ill. 1982). The three remaining counts, Counts I, II, and IV, assert claims against OMC under the Refuse Act, under § 309 of the Clean Water Act, 33 U.S.C. § 1319, and under § 106(a) of CERCLA. The court denied OMC's motions to dismiss these counts in two orders dated October 8, 1982. *United States v. Outboard Marine Corporation*, 549 F.Supp. 1036, 556 F.Supp. 54 (N.D. Ill. 1982). With the exception of civil penalties sought only under Count II, all seven counts seek the same relief—a mandatory cleanup injunction primarily requiring the removal of accumulated PCBs from the Waukegan Habor.

OMC's motions to dismiss Counts I, II, and IV argued mainly that mandatory injunctions generally are not available to require private parties to clean up accumulated hazardous substances. The Clean Water Act and CERCLA both contain provisions under which the United States may conduct its own cleanup of hazardous substances and then sue to recover its cleanup costs. 33 U.S.C. § 1321; 42 U.S.C. §§ 9604, 9607. OMC argued that these and other provisions preclude issuance of mandatory cleanup injunctions under 33 U.S.C. § 1319(b) and 42 U.S.C. § 9606(a). OMC also argued that the 1972 amendments to the Clean Water Act preempted the issuance of injunctions to enforce the Refuse Act, 33 U.S.C. § 407, which does not explicitly authorize the granting of injunctive relief. The court rejected these arguments, holding that the requested injunctive relief is available under all three statutes. 549 F.Supp. 1035; 556 F.Supp. 54. On November 12, 1982 OMC filed a motion to reconsider the court's orders, again arguing that injunctive relief is not available. The court informed the parties that it would give OMC's motion serious consideration, and, in a departure from its usual practice respecting pre-trial motions, the court set the matter for oral argument. The court's order dated

February 18, 1983 formulated specific questions to be addressed during argument, all relating to the availability of (or to the standards for granting) mandatory injunctive relief under the statutes in question.

At some point along the way, the United States decided to cease its efforts to obtain a mandatory cleanup injunction, and instead to conduct its own cleanup, to be followed by a suit to recover its cleanup costs. On February 25, 1983 the United States filed what purported to be a notice under Fed.R.Civ.P. 41(a)(1)(i), dismissing Count IV, the CERCLA injunction count, without prejudice. OMC objected, and at the court's suggestion the United States filed an alternative motion to dismiss Count IV under Fed.R.Civ.P. 41(a)(2), without waiving its claim to dismiss Count IV as of right. On March 21, 1983 the United States, joined by Illinois, moved for a stay of proceedings during the pendency of a government cleanup under § 104 of CERCLA, 42 U.S.C. § 9604. OMC and Monsanto opposed the United States' proposal, and Monsanto filed a motion to bifurcate under Fed.R.Civ.P. 42(b), requesting an early trial of certain issues before any government cleanup. Although these motions were briefed on the understanding that the court would decide them promptly, on July 26, 1983, at the parties' suggestion, the court stayed consideration of the motions until after the EPA issued a final version of its proposed government cleanup.

The EPA proceeded with its administrative determination, including public meetings and comment periods. On May 15, 1984 the EPA issued the final version of its report, in the form of a Record of Decision ("ROD") supporting its selection from among different alternative cleanup remedies. Within a few days the United States filed a motion, joined in by the State of Illinois, for voluntary dismissal of its suit under Fed.R.Civ.P. 41(a)(2). The United States intends to implement the selected remedy, probably to be followed by a cost recovery suit. OMC and Monsanto oppose the United States' motion. The United States still maintains that it dismissed Count IV as of

right, but the court will begin by assuming that the United States' purported notice of dismissal was of no effect; the court will address the notice of dismissal later in this opinion.

II. VOLUNTARY DISMISSAL

Fed.R.Civ.P. 41(a)(2), under which the United States moves, reads in pertinent part:

> Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. . . . Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

The purpose of this rule is to prevent voluntary dismissals which unfairly affect an opposing party. In general, dismissal should be allowed, unless the defendant will suffer some plain legal prejudice beyond the mere prospect of a second law suit. *Stern v. Barnett*, 452 F.2d 211, 213 (7th Cir. 1971). Disposition of a motion under Fed.R.Civ.P. 41 (a)(2) is a matter for the sound discretion of the trial court. The court's discretion runs not only to the setting of proper terms and conditions, but also to the question of whether dismissal will be allowed at all. *Grivas v. Parmelee Transportation Co.*, 207 F.2d 334, 336 (7th Cir. 1953), *cert. denied*, 347 U.S. 913, 74 S.Ct. 477, 98 L.Ed. 1069 (1954), *overruling Bolten v. General Motors Corp.*, 180 F.2d 379 (7th Cir. 1950). If the court allows dismissal but sets conditions not requested by the plaintiff, then the plaintiff may withdraw its motion. *GAF Corporation v. Transamerica Insurance Co.*, 665 F.2d 364, 367-68 (D.C. Cir. 1981). Standards for ruling upon motions under Fed. R.Civ.P. 41(a)(2) are discussed in *Tyco Laboratories, Inc. v. Koppers Co.*, 627 F.2d 54 (7th Cir. 1980), and *Pace v. Southern Express Co.*, 409 F.2d 331 (7th Cir. 1969).

In this case OMC and Monsanto both argue that the court should not dismiss this action, and instead should set the case for trial on these questions:

> Whether the PCBs in Waukegan Harbor and on the property of Outboard Marine Corporation pose a risk of substantial and imminent harm to the public health, drinking water, or acquatic life in the Waukegan Harbor area?

What remedy, if any, is appropriate under the circumstances? (Monsanto motion for bifurcation filed 3/25/83.) OMC alternatively asks that the case be dismissed with prejudice.

A. Dismissal with prejudice

Counts III, V, VI, and VII have been dismissed for failure to state a claim upon which relief can be granted, and it appears to be understood by the parties that dismissal of these counts shall be with prejudice. The United States asks that Counts I, II, and IV be dismissed without prejudice, but it is clear to the court that dismissal without prejudice potentially could affect the defendants unfairly. The court was about to take oral argument on OMC's motion to reconsider when the United States changed its approach to this case. The court would have ruled on the motion to reconsider well over a year ago. While the court does not know how it would have ruled, there was a serious possibility that the court would have granted OMC's motion. Having forestalled a ruling on OMC's motion, the United States should not be allowed the option of reinstating the claims it asserts in Counts I, II, and IV. The United States suggests that dismissal with prejudice is unnecessary, pointing out that the statute of limitations has run on its claim for penalties under the Clean Water Act, and stating that its claims for injunctive relief are mooted by the proposed government cleanup. The court believes, however, that the defendants should be protected against even a slim possibility that the United States might change its plans again. This litigation undoubtedly has been very costly for the parties to litigate. The United States should not be permitted, at some future time, to move backward and return to its original approach to the problem.

The court therefore will allow dismissal of Counts I, II, and IV only with prejudice. Such dismissal "is subject to the usual rules of res judicata." 9 C. Wright & A. Miller, *Federal Practice and Procedure* § 2367 at 185-86 (1971). The court assumes that dismissal with prejudice will bar reinstatement of Counts I, II, and IV but will not bar a future cost-recovery suit, and the court does not understand OMC or Monsanto to argue otherwise. If for no other reason, a future cost-recovery suit would appear not to be barred because a claim to recover costs incurred in the cleanup could not have been joined with this action. Res judicata generally does not bar claims that could not have been brought in the first action. *See generally Marrese v. American Academy of Orthopaedic Surgeons*, 726 F.2d 1150 (7th Cir. 1984), *cert. granted*, ____ U.S. ____, 104 S.Ct. 3553, 82 L.Ed.2d 854 (1984). Lest there be any misunderstanding, the court will state clearly that dismissal is with prejudice generally, but without prejudice to a future cost-recovery suit. Also for the sake of clarity, the court emphasizes that it is setting dismissal with prejudice as a condition of voluntary dismissal under Fed.R.Civ.P. 41(a)(2), and the United States may accept dismissal under this condition or it may withdraw its motion for voluntary dismissal. The court is not ordering an involuntary dismissal under Fed.R.Civ.P. 41(b), as suggested by OMC. (OMC memo filed 6/22/84, p. 30.)

B. If dismissal were not allowed

OMC and Monsanto ask the court not to allow dismissal. Only as an alternative request does OMC ask that dismissal be with prejudice. The court does not believe, however, that refusing to allow dismissal would be an appropriate way of protecting OMC and Monsanto from prejudice.

In the *Pace* case, cited above, the Court of Appeals upheld a district court's refusal to allow dismissal on a motion under Fed.R.Civ.P. 41(a)(2). The defendant's simple and meritorious motion for summary judgment was ripe for decision, and in moving for voluntary dismissal without prejudice the plaintiff apparently hoped to avoid sum-

mary judgment and proceed with parallel litigation in state court. The Court held that the defendant was entitled to have the litigation "disposed of in a manner that will protect the defendant against future litigation." 409 F.2d at 334. Of course, dismissal with prejudice also would have protected the defendant against future litigation. A review of *Pace* suggests that denying the motion for voluntary dismissal, rather than allowing dismissal with prejudice, was appropriate for at least two reasons. First, the motion for summary judgment apparently could be disposed of easily. Second, granting dismissal with prejudice probably would have been a useless exercise, since the plaintiff could have been expected to reject the condition of dismissal with prejudice, if the court properly divined her intentions. *See id.* at 334. In this case, neither of these factors is present. First, this case could not be disposed of easily if the court did not allow dismissal. Second, it seems likely that the United States will accept the condition of dismissal with prejudice, since its intention is not to refile Counts I, II, and IV, but rather to clean up the Harbor and file a cost-recovery suit, a course of action which is not barred by dismissal with prejudice. Other possible reasons for not allowing dismissal require more discussion.

1. The Record of Decision

OMC's and Monsanto's opposition to dismissal plainly is an attempt to obtain judicial review of the ROD before cleanup is undertaken. Each defendant has devoted an overwhelming portion of its memorandum on this motion to attacking the ROD. Among other points, OMC and Monsanto argue that the ROD ignores current scientific literature minimizing the harmfulness of PCBs, and that the United States' responses to certain requests for admission under Fed.R.Civ.P. 36 demonstrate the absence of any real health hazard. OMC and Monsanto also criticize the proposed remedy. Among other criticisms, OMC and Monsanto argue that if PCBs do indeed pose a serious threat, then the proposed cleanup will stir up PCBs presently buried beneath layers of sediment.

The statutory scheme does not provide for any judicial review until such time as the United States sues to recover its cleanup costs, and the defendants have articulated no theory entitling them to pre-cleanup review. Nonetheless, Monsanto asks the court "to bifurcate and set for an early trial the two issues that are central not only to this case but also to full and fair evaluation of the remedial action proposed in EPA's recent Record of Decision." (Monsanto memo filed 6/22/84, p. 2.) OMC states that overlap of certain issues between the Second Amended Complaint and any future cost recovery suit are sufficient to "permit a trial on all the troublesome questions raised by the R.O.D." (OMC memo filed 6/22/84, p. 29.) OMC also states:

> The government now wants to dismiss the case entirely so that without public scrutiny it can implement a Record of Decision which counsel for the EPA candidly admitted at the last status hearing still has "a few kinks" in it.

(OMC memo filed 6/22/84, p. 2.)

It is not really accurate, first of all, to say that there has been no scrutiny of the proposed cleanup plan. The EPA has held public meetings and taken comments from the public. It is true that there has been no judicial review of the ROD, but that is because such review is not contemplated by the statutory scheme until the United States sues to recover its costs. If the court refused to allow dismissal of this suit, it still would not be proper to use this action to conduct a judicial review of the ROD. Allowing dismissal of this action therefore does not deprive defendants of a legitimate opportunity to obtain review of the ROD. The United States does not need permission from the court to proceed with the proposed cleanup. The court's role on this motion is to protect the defendants from legal prejudice. Any inconvenience or harm flowing from implementation of the proposed cleanup properly must be characterized as a consequence of administrative determinations and actions, and not as legal prejudice resulting from voluntary dismissal of this suit.

2. Collateral estoppel

If this case were not dismissed, and went to trial, judgment on the merits would not appear to preclude a future cost-recovery suit under the principle of res judicata, for the same reasons that dismissal with prejudice would not bar such a suit—a cost-recovery claim could not have been brought in this action. Neither defendant has argued to the contrary.[1] By requesting trial of certain bifurcated issues, defendants seem to suggest they could obtain rulings which effectively would bar a future cost-recovery suit not under the principle of res judicata, but under the principle of collateral estoppel. The court is not convinced at all, though, that a trial in this action—with or without bifurcation—really would allow defendants to obtain a ruling which would be of significant help to them in a future cost-recovery suit. Dismissal with prejudice therefore would not deprive defendants of an opportunity to obtain rulings which would have a substantial collateral estoppel effect in a future proceeding.

The first question proposed for bifurcation is based on the standard of "substantial and imminent harm" appearing in § 106(a) of CERCLA, 42 U.S.C. § 9606(a), under which Count IV seeks injunctive relief. It does not appear that the United States must prove "substantial and imminent harm," or the risk thereof, in a cost-recovery suit based on release of PCBs, which are a designated hazardous substance. *See* 42 U.S.C. § 9604(a)(1); 40 C.F.R.

[1] Strictly speaking, of course, this res judicata question is not squarely before the court. The court addresses it only in an attempt to determine whether allowing the United States to dismiss with prejudice deprives defendants of an opportunity to obtain a judgment which would preclude a future cost-recovery suit. Addressing the question only in this context, the court relies heavily on defendants' failure to articulate any argument in support of such a res judicata effect. Throughout this opinion the court uses the term "res judicata" to mean claim preclusion or merger and bar, and the term "collateral estoppel" to mean issue preclusion. *See* Restatement (Second) of Judgments § 18 (merger), § 19 (bar); § 27 (issue preclusion) (1982).

§ 116.4 (1983). The court rejects Monsanto's possible suggestion to the contrary, which is based only on a supposed admission by United States Attorney Dan K. Webb. (Monsanto memo filed 3/25/83, p. 3.) A ruling that there is no "substantial and imminent harm," or risk thereof, therefore would not bar a future cost recovery action.

There also is no guarantee that the proposed bifurcated trial would result in a ruling upon the remedy proposed in the ROD. It should be noted that the ROD identifies a $75,000,000 remedy as the "cost-effective" alternative. (ROD, p. 32.) Because only limited funds are available to finance cleanup operations, the EPA is required to select the "fund-balanced" alternative, which in this case is estimated to cost $21,300,000. (ROD, pp. 32, 37.) Free from the requirement of selecting a "fund-balanced" alternative, the United States might press for an injunction requiring OMC to carry out the $75,000,000 "cost-effective" remedy, never placing the $21,300,000 remedy before the court. Even if the $21,300,000 remedy were before the court, a decision not to enjoin OMC to carry out the $21,300,000 remedy would not be equivalent to a ruling that the United States could not recover its costs after carrying out the $21,300,000 remedy by itself. Defendants have not shown, therefore, that their bifurcation proposal could result in a judgment which would protect them from a future cost-recovery suit.

It also should be noted that the next step in this lawsuit, if the court refused to dismiss, ordinarily would be a ruling on OMC's motion to reconsider. OMC now suggests that the court "hold" its motion to reconsider, pending trial of the bifurcated issues. (OMC memo filed 6/22/84, p. 29.) This is part of defendants' effort to jockey the present lawsuit into a posture in which it might serve as a vehicle for premature judicial review of the ROD. If the court did proceed first to rule on OMC's motion to reconsider, it is at least a realistic possibility that the court would grant OMC's motion. If the court granted OMC's motion to reconsider, then the remaining counts of this case would be dismissed on the basis that a mandatory

cleanup injunction is not available. Obviously, dismissal on that basis would not bar a future cost-recovery action. If the court denied OMC's motion to reconsider, and set the case for full—rather than bifurcated—trial, it still would be highly doubtful that any judgment rendered would bar a future cost recovery action. In opposing dismissal, defendants do not ask for a full trial.

3. Public interest and public perceptions

OMC and Monsanto raise several points with respect to the public in the Waukegan area. OMC and Monsanto argue that the public interest will best be served by a prompt adjudication under the proposed bifurcation. (Monsanto memo filed 6/22/84, p. 4; OMC memo filed 6/22/84, p. 31.) It is clear that local residents and businesses suffer from continuing uncertainty as to the future of the Waukegan Harbor. They do not know whether there is a genuine threat to the public health, and they fear that any cleanup operation may disrupt not only their recreational facilities, but also, for many, their livelihood. The court is sensitive to the public's desire for a prompt resolution of this controversy, but the court believes that the public interest would not be served by a refusal to dismiss this case. The EPA has expertise in the field of environmental concerns which a court simply does not have. Further, the administrative decision-making process is better able to focus on the questions of whether a remedy should be undertaken and, if so, which remedy. The court necessarily must focus on the questions presented by the legal posture of the case before it, and it may not reach out to decide other questions, however important they are to the public interest. It is very possible that a trial in this court would not result in a satisfactory resolution of the questions with which the public is concerned; or, much worse, the court's judgment might appear generally to have given the Harbor a clean bill of health, without really having answered all the important questions. For instance, the standard of proof at trial might be one of "imminent and substantial endangerment." (Monsanto motion filed 3/25/83.) If it

were determined that there is no imminent danger, the defendants would win, but the important question of long-term danger would remain unanswered.

Monsanto also makes this argument:

> [I]t must be assumed that the publicity surrounding this litigation has caused the public generally to rely on this Court to insure that whatever action EPA takes is both necessary and reasonable. Granting plaintiff's Motion to Dismiss will be interpreted by the public as tantamount to a finding by the Court that there is a serious public health problem in the Waukegan area and an endorsement of the reasonableness of the Government's proposed remedy.

(Monsanto memo filed 6/22/84, p. 4.) In response to this concern, the court will state clearly that neither this ruling nor any other ruling made in this case constitutes a finding that there is a health problem or an endorsement of the EPA's proposed cleanup remedy. The court's ruling is based, instead, on an acknowledgement that the executive branch of the federal government is empowered by statute to undertake its own cleanup operations without prior approval from the judicial branch.

OMC and Monsanto also complain that the United States has been trying its case in the press, inciting the public to view OMC and Monsanto as environmental villains. Montanto states that its "only opportunity to vindicate itself is through a prompt trial of the key issues." (Monsanto memo filed 6/22/84, p. 3.) This concern, while its importance should not be underestimated, is not sufficient to justify an otherwise unwarranted trial. *E.g.*, *Wainwright Securities, Inc. v. Wall Street Transcript Corp.*, 80 F.R.D. 103, 105-06 (S.D.N.Y. 1978). The court will state clearly that its ruling should not be construed as any reflection on any actions OMC or Monsanto may have taken, or on the way they have defended this lawsuit.

C. Payment of costs, fees, and expenses

Motions for voluntary dismissal under Fed.R.Civ.P. 41(a)(2) commonly are granted on the condition that the plaintiff pay the defendant's costs or attorney fees. *E.g., Victory Beauty Supply, Inc. v. La Maur, Inc.*, 98 F.R.D. 306, 309 (N.D. Ill. 1983). Neither OMC nor Monsanto has asked for an award of taxable costs, as might be permitted under 28 U.S.C. § 2412(a). *See* 9 C. Wright & A. Miller, *Federal Practice and Procedure* § 2366 at 182 (1971); *but see* 5 *Moore's Federal Practice* ¶ 41.06 at 41.87 n. 5 (2d ed. 1982). In a brief footnote at the end of its memorandum, Monsanto makes an unsupported request for "reimbursement of its fees and expenses pursuant to 28 U.S.C. § 2412." (Monsanto memo filed 6/22/84, p. 13n.) The United States replies equally briefly, stating that there is no authority for such a request. (U.S. memo filed 7/23/84, p. 11 n. 7.)

Monsanto's use of the phrase "fees and expenses" indicates clearly that it is not asking for costs under § 2412(a). Further, for several reasons, Monsanto's request is not a proper application for fees and expenses under § 2412(d). It is conceivable that the court could award Monsanto its attorney fees and expenses as a condition of voluntary dismissal, under § 2412(b). Monsanto's brief request is wholly insufficient to justify such an award, however, so the court will not condition dismissal upon payment of Monsanto's fees and expenses. Similarly, the court will not condition dismissal upon payment of OMC's costs or fees and expenses, as OMC has not even raised the issue.

III. COUNT IV

As noted above, the United States filed what purported to be a notice dismissing Count IV without prejudice under Fed.R.Civ.P. 41(a)(1)(i). OMC had answered the original complaint on November 7, 1978, and on January 27, 1981 the court granted OMC's motion to allow its original answer to stand as its answer to the Amended Complaint. Count IV was added with the filing of the Second

Amended Complaint on February 2, 1982. OMC moved to dismiss the Second Amended Complaint, and then moved for reconsideration of the denial of its motion, and thus it never filed an answer to Count IV. The United States therefore believes it was entitled to dismiss Count IV under Fed.R.Civ.P. 41(a)(1), which reads, in pertinent part:

> [A]n action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs.

OMC argues that this procedure may be used only to dismiss entire actions, not to dismiss only one of several claims against a defendant. There is little case law addressing this question, and it is not precisely on point. *See Exxon Corp. v. Maryland Casualty Co.*, 599 F.2d 659, 662 (5th Cir. 1979); *Smith, Kline & French Laboratories v. A.H. Robins Co.*, 61 F.R.D. 24, 29 (E.D. Pa. 1973). These cases generally support OMC's argument, and the court agrees. Fed.R.Civ.P. 41(a)(1) governs dismissal of entire actions, not of single claims. Of course, the court has no occasion to discuss the situation in which a plaintiff wishes to dismiss all claims against only one of several defendants.

The court believes, further, that it is not of much importance in this case whether the purported dismissal of Count IV was or was not effective. Even if the notice did operate to dismiss Count IV without prejudice, refiling of Count IV almost certainly would be barred by the court's present dismissal of Counts I and II with prejudice, since all three counts seek identical relief on essentially the same set of facts. Any other rule would allow circumvention of the prohibition of claim-splitting. When claims which properly may not be split are joined together, if the plaintiff could dismiss one claim without prejudice as of right, and then refile that claim after a decision on the merits of the other claim, then the plaintiff effectively could split its claims.

IV. ILLINOIS

Illinois moved to intervene in this action, but its motion was denied by order dated May 29, 1979. Illinois appealed, and the Court of Appeals held that Illinois could intervene as of statutory right. *State of Illinois v. Outboard Marine Corporation*, 680 F.2d 473, 480-81 (7th Cir. 1982); *see also State of Illinois v. Outboard Marine Corporation*, 619 F.2d 623, 630-32 (7th Cir. 1980), *vacated and remanded*, 453 U.S. 917, 101 S.Ct. 3152, 69 L.Ed.2d 1000 (1981). Illinois also had filed its own action, which the court dismissed without prejudice because it duplicated Illinois' claims in this action. *State of Illinois v. Outboard Marine Corporation*, No. 78 C 3187 (N.D. Ill. Sept. 30, 1982). OMC has moved to dismiss four state-law claims which Illinois asserts in its complaint-in-intervention, but the court has not ruled on OMC's motion.

On March 18, 1983 Illinois moved for a stay of proceedings pending a government cleanup under CERCLA, anticipating the United States' similar motion by three days. More recently, Illinois was granted leave to join in the United States' present motion for voluntary dismissal under Fed.R.Civ.P. 41(a)(2). In addition to joining in the United States' motion, Illinois has adopted the United States' reply brief in support of its motion, stating also that "the State of Illinois is committed to the remedy contained in the Record of Decision for the cleanup of Waukegan Harbor." (Illinois memo filed 7/23/84, p. 2.)

On the present motion, the parties have not given any separate consideration to Illinois' pending complaint-in-intervention. The court assumes that Illinois' joining in the United States' motion amounts to a request for voluntary dismissal of Illinois' own claims, and the court also assumes that the foregoing discussion applies equally to Illinois. Illinois' claims therefore are dismissed with prejudice.

V. CONCLUSION

A status hearing is set for September 14, 1984. At that time the United States and Illinois shall inform the court whether they accept the conditions of dismissal, or whether they wish to withdraw the motion for voluntary dismissal and proceed with this litigation. Also at that time the parties shall report to the court on the status of the remaining third-party claim and cross-claim, and on the status of *Outboard Marine Corporation v. Costle*, No. 78 C 751.

Accordingly, the court grants the United States' motion, joined in by Illinois, for voluntary dismissal under Fed.R.Civ.P. 41(a)(2). Dismissal of the United States' claims and of Illinois' claims is granted on the condition that dismissal shall be with prejudice; however, dismissal shall be without prejudice to a future cost-recovery suit after a government cleanup. A status hearing is set for September 14, 1984.

It is so ordered.

APPENDIX E

RELEVANT STATUTORY AUTHORITY

Federal Rules of Civil Procedure 41(a)(2)

By Order of Court. Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

The Comprehensive Environmental Response, Compensation and Liability Act of 1980

Sec. 104. Response Authorities

(a)(1) Whenever (A) any hazardous substance is released or there is a substantial threat of such a release into the environment, or (B) there is a release or substantial threat of release into the environment of any pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare, the President is authorized to act, consistent with the national contingency plan, to remove or arrange for the removal of, and provide for remedial action relating to such hazardous substance, pollutant, or contaminant at any time (including its removal from any contaminated natural resource), or take any other response measure consistent with the national contingency plan which the President deems neces-

sary to protect the public health or welfare or the environment, unless the President determines that such removal and remedial action will be done properly by the owner or operator of the vessel or facility from which the release or threat of release emanates, or by any other responsible party.

Sec. 106. Abatement Action

(a) In addition to any other action by a State or local government, when the President determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility, he may require the Attorney General of the United States to secure such relief as may be necessary to abate such danger or threat, and the district court of the United States in the district in which the threat occurs shall have jurisdiction to grant such relief as the public interest and the equities of the case may require. The President may also, after notice to the affected State, take other action under this section including, but not limited to, issuing such orders as may be necessary to protect public health and welfare and the environment.

Sec. 107. Liability

(a) Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—

(1) the owner and operator of a vessel (otherwise subject to the jurisdiction of the United States) or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such per-

son, by any other party or entity, at any facility owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for—

(A) all costs of removal or remedial action incurred by the United States Government or a State not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan; and

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release.